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Restoring Limits on the FCC's Ancillary Authority

by

Daniel A. Lyons *

Verizon's pending appeal of the Federal Communications Commission's net neutrality order presents one of the most significant legal questions in modern telecommunications policy: whether, and to what extent, the Commission can regulate Internet activity. New Commission Chairman Tom Wheeler has stated clearly that "regulating the Internet is a non-starter."¹ But the Commission's actions over the last several years belie that notion. Since 2007, the Commission has enacted binding regulations on a wide range of actors within the Internet ecosystem, including Internet service providers,² Voice-over-Internet-Protocol (VoIP) applications,³ Over-the-Top text message services,⁴ and Internet-based providers of Telecommunications Relay Services.⁵ The Commission enacted each of these rules pursuant to a theory of jurisdiction that, at times, has seemed virtually limitless in its reach over any communication by wire or radio.

Whether the agency will successfully defend its net neutrality rules will turn largely upon its ability to defend this jurisdictional theory, known as Title I ancillary authority. At first glance, one might think the agency's chances are good: the United States Supreme Court has long recognized that Title I allows the Commission to oversee at least some communications beyond the broadcasters and telephone companies that lay at its historical regulatory core. Title I acts as the rough agency equivalent of the Constitution's "necessary and proper" clause, permitting the Commission to regulate other communications by wire or radio if such regulation is "necessary to ensure the achievement of the Commission's statutory responsibilities."⁶

But the legal arguments over net neutrality show that the Commission's recent reliance on Title I is both quantitatively and qualitatively unmoored from its historical origins. The Commission has invoked its ancillary authority roughly as often in the past six years as it did in the preceding seventy-three years combined. And it has increasingly done so not to perfect its statutory obligations over twentieth century broadcasting, cable, and telephone networks, but to create new obligations on twenty-first century IP networks.

In an apparent attempt to remain relevant in light of technological change, the Commission seeks to transform itself from an agency that carries out a congressional mandate to one that creates common-law-like regulation of the Internet. But the Commission's ancillary authority cannot support such lofty aspirations. The statute, prior case law, and basic rule of law principles require that any claimed authority be subject to principled constraints.

The Origins of Title I Ancillary Authority

Admittedly, some agencies have wide-ranging authority to regulate broad swaths of the economy in common law-like fashion. The Federal Trade Commission, for example, has been charged by Congress generally to prohibit "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce."⁷ Courts have interpreted this language to authorize the agency to develop and enforce America's competition law by regulating anticompetitive conduct by companies throughout the economy, subject to judicial review.

But the Federal Communications Commission does not have such a broad, free-ranging statutory mandate. The Communications Act of 1934, as amended, has three substantive titles: Title II, governing common carriers of interstate telecommunications; Title III, regulating broadcasters and other spectrum licensees; and Title VI, covering cable television networks. Each title contains a lengthy statutory scheme by which Congress has established the laws governing the communications network in question. In each title, the Commission's rulemaking authority is tethered to its statutory mandate. Title II, for example, provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest *to carry out the provisions of this chapter*."⁸ Title III allows the agency to issue licenses in the public interest and "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to *carry out the provisions of this chapter*."⁹ And while Title VI does not contain a parallel grant of rulemaking authority, it makes clear that the Commission "may not impose requirements regarding the provision or content of cable services, *except as expressly provided in this subchapter*."¹⁰ Thus each title ties the agency's rulemaking authority, in some way, specifically to the goal of carrying out Congress's mandate.

The potential ambiguity comes in Title I, which contains an additional general grant of rulemaking authority. Section 4(i) of the Act provides that the agency may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."¹¹ This seemingly sweeping grant of authority is nestled amidst a series of provisions about the general administrative structure of the Commission – wedged between a clause establishing the agency's official seal and a discussion of conduct at agency proceedings.

In a seminal Harvard Law Review article about grants of rulemaking authority to agencies, Thomas Merrill and Kathryn Tongue Watts argue that this clause was originally intended to grant the agency only “procedural rulemaking powers,” not a general power to make legislative rules.¹² In addition to its placement in the statute, Merrill and Watts note that the Communications Act was based upon the Interstate Commerce Act of 1887. The analogue to Section 4(i) in the ICA, Section 17, granted only procedural powers, not legislative powers.¹³ Moreover, they note that Section 4(i) was part of the original draft bill and was neither amended during debate nor even mentioned in any of the Committee reports on the Communications Act. “It is most unlikely,” they surmise, “that this provision would have been entirely uncontroversial if it had been understood as conferring general legislative rulemaking authority on the FCC.”¹⁴

The Supreme Court initially took a far more expansive reading. In *United States v. Southwestern Cable Co.*,¹⁵ several cable companies challenged a Commission regulation limiting the importation of out-of-market broadcast signals.¹⁶ At the time, the Commission had direct regulatory authority only over Title II common carriers and Title III broadcasters. Cable programmers, which were primarily retransmitters of broadcast signals, fell under neither title. But the Court explained that Congress “gave the Commission ‘a comprehensive mandate,’ with ‘not niggardly but expansive powers.’”¹⁷ Section 2(a) provides that the Act “shall apply to all interstate and foreign communication by wire or radio,” not just broadcasters and telephone companies. And the Commission argued that its regulation was necessary to prevent cable companies from interfering with the agency’s statutory efforts to promote local broadcasting and mitigate interference among broadcasters. Given this direct statutory mandate, the Court concluded that the Commission could restrict cable retransmission of broadcast content even if cable providers fit under neither of the Act’s two substantive provisions.¹⁸

But subsequent cases limited the scope of this “ancillary authority.” In *Midwest Video I*, a fractured Court narrowly upheld a rule requiring that cable retransmitters of broadcast content also facilitate locally produced non-broadcast content.¹⁹ The plurality explained that under *Southwestern Cable*, the Commission’s general authority extended only to rules that are “reasonably ancillary to the effective performance of its various responsibilities.”²⁰ In this case, the local origination rule assured that when retransmitting broadcast content, cable companies further the Commission’s objective of “providing suitably diversified programming.” The plurality explained that the rule was similar to regulations governing technological quality of retransmitted broadcast signals – except that it was focused on quality of content rather than quality of the picture and audio received by the viewer.²¹

As James Speta, a fellow Member of the Free State Foundation Board of Academic Advisors, has noted,²² Chief Justice Burger’s concurrence in the judgment is even more limited. Burger noted that the case “presents questions of extraordinary difficulty” and that “the Commission’s position strains the outer limits of even the open-ended and pervasive jurisdiction” implicated by *Southwestern Cable*.²³ Ultimately, Burger upheld the local origination rule because “[t]hose who exploit the existing broadcast signals for private commercial [gain]... are not exactly strangers to the stream of broadcasting.... [W]hen they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.”²⁴ Professor Speta explains that Burger’s theory “is much narrower than the plurality’s; it essentially says that the

FCC could forbid the carriage of broadcast signals on cable (a seemingly uncontroversial proposition) and, as such, it can also impose conditions.”²⁵ And because Burger’s vote was necessary to secure a majority, its narrower reading should control the scope of the agency’s Title I authority.

The Court enforced these limits in *Midwest Video II*.²⁶ This case involved Commission rules requiring cable companies to carry specific channels for public, educational, government, and leased access programming. The Court ruled it was insufficient that the Commission found these rules were “reasonably related” to the agency’s “statutory objectives.”²⁷ Rather, the Commission’s authority to regulate cable was “delimited by its statutory responsibilities over television broadcasting.”²⁸ Although the agency’s objective – promoting localism and diversity – were similar to those in *Midwest Video I*, its methodology – treating cable companies as common carriers of local content – contravened the Act’s provisions that protect the “journalistic freedom of persons engaged in broadcasting.” Because the Act expressly prohibits the Commission from subjecting broadcasters to common carriage obligations, the Commission cannot foist such obligations on cable companies in the interests of promoting its broadcast obligations. Such regulations, held the court, went beyond the Commission’s “circumscribed range of power” under Title I and must instead “come specifically from Congress.”²⁹

This cable trilogy emphasizes that the Commission’s Title I authority must be related to a direct statutory mandate, although the cases do not clearly articulate how close a fit is required. Professor Speta reads the cases to suggest that Title I can only extend to communications networks that are “providing or carrying a service regulated by the Communications Act.”³⁰ This reading would accord with the facts of the cable trilogy: *Southwestern Cable* and *Midwest Video I* both involved cable systems that carried regulated broadcast signals, a fact that was key to Justice Burger’s concurrence, while *Midwest Video II* involved direct cable regulation independent of broadcast transport.

At the other pole, one might read the cable trilogy broadly to suggest that Title I extends to any communication by wire or radio whose effect is not inconsistent with the Act. One may glean such a rule from the holding in *Midwest Video II*, which invalidated cable common carriage because it conflicted with the Act’s policy against abrogating broadcasters’ editorial control. But this “all that is not prohibited is permissible” interpretation ignores the Court’s repeated admonition that “the Commission was not delegated unrestrained authority” and that any such exercise must further a statutory objective. “[W]ithout reference to the provisions of the Act directly governing broadcasting,” the *Midwest Video II* Court explained, “the Commission’s jurisdiction under Section 2(a) would be unbounded.”

Perhaps the best interpretation flows from the Act itself. First, Title I authority can only be used to reach entities engaged in “interstate communication by wire or radio.” This observation should be relatively uncontroversial, although on occasion courts have had to remind the Commission of this limit.³¹ Second, the Commission should only regulate these entities if it can show that the regulation in question is “necessary to ensure the achievement of the Commission’s statutory responsibilities.”³² *Midwest Video II* emphasized this language, which is taken directly from, and therefore cabins, Section 4(i)’s general rulemaking power.

The FCC's Modern Abuse of Ancillary Authority

In the years following *Midwest Video II*, the Commission only occasionally invoked its ancillary authority, often to impose additional regulatory requirements on services that were subject to the agency's direct authority. For example, the Commission used ancillary authority to require individual shareholders to divest themselves of stock held in violation of the agency's multiple ownership rules,³³ to impose syndicated exclusivity rules on cable operators (which are, since 1984, directly regulated by the agency),³⁴ and to impose common carriage obligations on LEC voluntary physical collocation offerings.³⁵

But as broadband Internet services began to displace traditional communications services, the Commission has seen both quantitative and qualitative changes in the use of its Title I authority. The Commission has invoked its ancillary authority roughly 65 times since 2007 – approximately the same number of times it has invoked its ancillary authority during the entirety of its history up to that point. In other words, about half of the agency's total invocations of its Title I authority have come in the last seven years.³⁶ And a growing number of these Title I rules are aimed not at broadcast, cable, and telephone service, but at broadband Internet service providers and those who provide certain Internet-based services. Rather than using ancillary authority as a tool to carry out Congress's statutory mandates, the Commission is grasping at statutory language to justify imposing its own mandates over broadband networks and the services that use them.

In the process, the connection between the Commission's rules and its underlying statute has grown increasingly tenuous. This is perhaps best exemplified by its infamous Comcast order, in which the Commission tried to sanction Comcast Corporation for throttling BitTorrent content over its broadband networks. To justify its new rule prohibiting unreasonable network management practices, the agency relied primarily upon two statements of general policy: Section 1, which declares the purpose of the Commission is to make a nationwide communications service available to all people at reasonable rates, and Section 230(b), which states that it is the policy of the United States to promote the continued development of the Internet.³⁷

But the DC Circuit found these statutory provisions were insufficient to support the Commission's claim of ancillary authority. The Court explained that ancillary authority cannot be used simply to pursue general statements of policy, but only in conjunction with an "express delegation of authority to the Commission" – a distinction supported by *Midwest Video*.³⁸ Policy statements do not create any binding mandates that the agency must enforce, that would be furthered by its exercise of ancillary authority. More generally, this theory affords few, if any, limits on the agency's ancillary authority. Almost any regulation could be justified as furthering the generic goal of making nationwide communications service available at reasonable rates, or promoting the development of the Internet. This jurisdictional claim is untenable, explained the Court, because it would "virtually free the Commission from its congressional tether."³⁹

Undeterred, the Commission has responded with a net neutrality order that relies on ancillary authority to impose an even more rigorous regulatory scheme on broadband providers.⁴⁰ This time, the agency anchors its claims to Section 706, which provides that the Commission and state regulators

shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.⁴¹

But this statutory language suffers the same flaw. Section 706 provides no express statutory mandate that the Commission must accomplish. It is unclear how net neutrality is “*necessary* to the achievement of the Commission’s statutory responsibilities” of removing barriers to infrastructure investment. As many commenters pointed out, the order is more likely to add barriers to investment by increasing the costs of providing broadband service. And like the Comcast order, there is virtually no limit to the potential regulations that could be justified under this theory. A theory of ancillary authority that allows the agency unlimited jurisdiction over services mentioned only in passing in the Act would ultimately “free the Commission from its congressional tether.”

Conclusion

In a sense, the Commission’s effort to stretch its ancillary authority to encompass Internet service and activities is understandable. Consumers are fleeing the twentieth century communications networks that lay at its regulatory core, at an unprecedented rate. They are instead focusing on twenty-first century IP networks, which are similar in some ways to their predecessors, but also different in many ways. Thus far, Congress has not provided the Commission guidance regarding what, if anything, it should do in response to this transition. So the Commission has attempted to fill the policy void itself, using whatever tools it perceives to be at its disposal.

But the Commission cannot use Title I to freelance at the edge of its statutory authority. Both the language of the Act and the cable cases teach that ancillary authority allows the Commission flexibility when carrying out the will of Congress – not to make new rules when Congress fails to act. The distinction was captured well by Chief Justice Burger’s concurrence in *Midwest Video I*: “The almost explosive development of [cable television] suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.” Similarly, the explosive growth of the Internet suggests the need to revisit the Act yet again. Going forward, the basic policies of American communications law must be set by Congress, not the agency. In its current form, the Communications Act offers only thin reeds, reeds that cannot support the weight of an agency-manufactured “law of the Internet.”

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¹ Remarks of FCC Chairman Tom Wheeler at The Ohio State University, Dec. 2, 2013, available at <http://www.fcc.gov/document/remarks-fcc-chairman-tom-wheeler-ohio-state-university> (last accessed December 6, 2013).

² See, e.g., Preserving the Open Internet: Broadband Industry Practices, 24 FCC Rcd. 13064 (2010).

³ See, e.g., Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, 22 FCC Rcd. 11275 (2007).

⁴ Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications, 28 F.C.C.R. 7556 (2013).

⁵ See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 23 FCC Rcd. 11591 (2008).

⁶ FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979).

⁷ 15 U.S.C. § 45.

⁸ 47 U.S.C. § 201(b) (emphasis added).

⁹ *Id.* § 303(r) (emphasis added).

¹⁰ *Id.* § 544(f) (emphasis added); but see *United Video v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989) (finding that legislative history suggests that Section 544(f) “does not suggest a concern with regulations of cable that are not based on the content of cable programming, and do not require that particular programs or types of programs be provided”).

¹¹ *Id.* § 154 (i).

¹² Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517-19 (2002).

¹³ *Id.* at 518.

¹⁴ *Id.* at 519.

¹⁵ 392 U.S. 157 (1968).

¹⁶ *Id.* at 167.

¹⁷ *Id.* at 173 (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 19 (1943)).

¹⁸ *Id.* at 181.

¹⁹ *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

²⁰ *Id.* at 663.

²¹ *Id.* at 669.

²² See James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. TELECOMM. & HIGH TECH. L. 101, 111 (2010).

²³ *Id.* at 675-76 (Burger, J., concurring in the judgment).

²⁴ *Id.* at 676.

²⁵ Speta, *supra* note 22, at 111.

²⁶ *United States v. Midwest Video Corp.*, 440 U.S. 689 (1979).

²⁷ *Id.* at 695, 702.

²⁸ *Id.* at 698.

²⁹ *Id.* at 696, 709.

³⁰ Speta, *supra* note 22, at 120.

³¹ See, e.g., *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

³² 47 U.S.C. § 154(i); *Midwest Video II*, 440 U.S. at 706 (emphasis added).

³³ Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 97 FCC 2d 997, 1033 (1984).

³⁴ Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 64 Rad. Reg. 2d (P & F) 1818 (1988).

³⁵ Expanded Interconnection with Local Telephone Company Facilities, 75 Rad. Reg. 2d (P & F) 1040 (1994).

³⁶ This figure is a rough estimate, and excludes instances in which the agency invokes its ancillary authority without creating binding obligations (for example, in deregulatory decisions) or simply recites earlier invocations of ancillary authority as explanation.

³⁷ See *Comcast Corp. v. FCC*, 600 F.3d 642, 651-52 (2010).

³⁸ *Id.* at 652.

³⁹ *Id.* at 655.

⁴⁰ Preserving the Open Internet: Broadband Industry Practices, 25 FCC Rcd. 17905, 17968-72 (2010).

⁴¹ 47 USC § 706.